



Remedies in Innovation Mergers

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*) The views expressed in this presentation are those of the author and do not necessarily reflect the views or opinions of the European Commission.

Introduction

- In fast-moving industries, mergers can potentially create significant competitive harm (as they may eliminate **nascent competition** in concentrated markets from the outset)
- But conversely, technologically **complementary mergers** can also create particularly large welfare gains in such industries
- Designing remedies in fast-moving markets is challenging, as the **scope of competition** in the future may not be known today
- Yet, remedies should **follow the competition concern**, but how?
- This presentation provides a brief discussion of the appropriate **scope of remedies** in markets with fast technological changes
- The discussion will be guided by **recent cases at the Commission** that involved innovation concerns in remedy design: *GE/Alstom*, *Dow/DuPont* and the EU mobile telephony mergers

Scope of remedies in innovative industries

- A key concern for remedies in innovative industries is their **scope to ensure viability**
- Importantly, divested businesses must be viable not only in the short run, but also have capabilities to **compete for the long run**
- While the long run may be difficult to predict in fast-moving industries, the scope of remedies will determine the **general capability of competing** for future markets
- Often, a **wider scope of remedies** may be necessary, for instance:
 - **R&D capabilities** (research teams)
 - **Financial capabilities** to be a viable competitor in innovation competition
 - **Access to essential inputs** supplied by the seller at reasonable cost
 - **Neighbouring markets** to address concerns of potential competition/convergence
- This is particularly true in cases where the theory of harm is explicitly **built on innovation competition**

Case study: *GE/Alstom* (2015)

- Merger in **gas turbines** with concerns mostly for large turbines
- Key issue of remedy scope: should existing **servicing contracts** ("installed base") be included in the scope of the divestment?
- Servicing accounts for **significant part of profits** and is offered together with the gas turbines (through long-term agreements)
- In-depth assessment of qualitative evidence revealed the existence of several channels through which access to sizeable installed base **influences competitiveness** of OEMs:
 - **Ability/incentives to innovate** and "prove" product (indirect network effects)
 - **Access to customers**
 - **Sourcing synergies**
 - **Cashflow**
- Final remedy included part of Alstom's **installed base**

Case study: *Dow/DuPont* (2017)

- "**Merger of equals**" in crop protection and seeds
- Allegedly "**5 to 4**", but investigation found
 - Strong **R&D overlaps** (closeness) in important areas for future products
 - Planned **R&D suppression** post-merger
 - Therefore, concern about **restriction of innovation competition** raised
- Divestment included most of DuPont's overlap products (insecticides and herbicides) plus DuPont's **global R&D organisation** (including discovery pipeline and part of development pipeline)
- Divestment is a reverse carve-out from DuPont (no "mix & match"), ensuring that current products are **matched to the underlying R&D capabilities**
- Aim is to render divestment of current products viable over the medium term, and to **replicate innovation capabilities** of DuPont

Case study: Mobile mergers (2014-2018)

- As discussed in the previous presentation, the Commission has recently assessed a large number of **mobile mergers**
- Some of these transactions were cleared subject to **divestiture**/creation of new MNO or **access remedy** for MVNO
- The "new" competitors required **access to network capacity** etc., which raises complex questions in such a fast-moving market:
 - Desire to provide access **at marginal cost** to replicate pre-merger incentives
 - How to determine the "right" access price **if technology is changing** quickly?
 - How to determine access terms when contract is **renewed in the future**?
- Questions **addressed** through:
 - **Capacity-based access** that guarantees access at marginal cost
 - **Capacity expansions** feasible
 - Future-proofness concerns easier to address with **structural MNO solutions** than with behavioral MVNO solutions

Conclusion

- In fast-moving markets, not only concerns about markets as they currently are have to be addressed, but also concerns about how firms **compete in the future or for the future**
- This includes **innovation competition** (e.g., Dow/DuPont) and **potential competition** (e.g., Facebook/Whatsapp)
- It may require **wider-ranging divestitures** than would be the case for a static concern (and potentially access remedies)
- In particular, divested businesses must have the capability to engage in R&D and **compete in a changing product space** without over-reliance on the merging parties
- With large uncertainty, even divestitures **may not be able to solve** reliably identified competition concerns
- Conversely, competition concerns **cannot be mere speculation**